In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 60

REVEREND E. S. EVANS, ET AL., PETITIONERS

v.

GUYTON G. ABNEY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The case is fully stated in the brief filed on behalf of the petitioners and we do not recapitulate the facts here. We submit this short memorandum to focus on particular arguments and to express the interest of the United States.

The government participated in this Court when the case was here before as *Evans* v. *Newton*, No. 61, October Term, 1965, 382 U.S. 296. As it happens, the United States has a special connection with Baconsfield through substantial federal aid granted for the improvement of the facility some years ago and assurances then received that the public character of the park would not be changed. It is, moreover, a

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matter of concern that all the residents of a municipality have been deprived of an important public facility on account of race. Then, as now, however, there was more at stake than non-discriminatory enjoyment of a large recreational park in Macon, Georgia.

As the case returns, it involves potentially far-reaching questions relating to the enforcement of racially restrictive stipulations in grants establishing charitable trusts. The United States speaks to those issues because of the continuing national concern to eradicate race discrimination in our public life.

ARGUMENT

The ultimate question in this case is whether a large recreational park which this Court has held subject to the constitutional rule of nondiscrimination shall be closed and the property returned to private hands rather than being opened up to the Negro citizens of the area. The Georgia courts have so decreed, declining to disregard the now unenforceable racially restrictive provision of the will which established the park half a century ago. Those who support the judgment below—including the administrators of the park, the trustees of the property, and the heirs of the testator, with no opposition from the municipality which would lose an important recreational facility—argue that this decision ends the matter, insisting that there is no federal constitutional question involved. We disagree, sharing the view of the petitioners that the Fourteenth Amendment stands in the way of this result.

1. At the outset, we confront the claim that the case involves nothing more than the construction of a will and an application of the local law of charitable trusts and therefore presents no federal question whatever. The answer, we suggest, is that given by this Court when immunity from scrutiny was asserted with respect to a discriminatory exercise of the generally absolute power to redefine municipal boundaries: insulation from federal judicial review "is not carried over when state power is used as an instrument for circumventing a federally protected right." *Gomillion* v. *Lightfoot,* 364 U.S. 339, 347. The traditionally local setting does not oust the constitutional inquiry when the charge is, as here, that State action threatens to deny important public benefits on the ground of race.

What is more, the present case does not intrude far into the traditional domain of private choice. No one here is remotely suggesting review of the motives—even racial bias—which govern the decisions of testators in writing or rewriting wills or establishing trusts. Nor, for that matter, do the present arguments call into question the power of any private individual to revoke a grant, terminate a trust, or close an established facility over which he has retained control—or to abandon a business—rather than comply with a federal constitutional or statutory requirement of non-discrimination. We deal only with affirmative *State action* withdrawing a public facility to avoid a declared obligation to cease discrimination on the basis of race.

And, finally, the case does not involve any real issue of construing a testator's actual intent. Although Sen-

ator Bacon made clear that he shared the prevailing prejudice of his time and place against the "mixing" of the races "in their social relations," then thought to include the use of recreational facilities (cf. *Civil Rights Cases*, 109 U.S. 3, 22, 24), he did not express himself on the question whether the racial restriction in his grant, if unenforceable, should defeat his intention to establish a public park. There is no way of knowing what his choice would have been had he known the present alternatives when he wrote his will. Still less is there any basis for saying that he would wish Baconsfield closed altogether after half a century because the law now requires that Negroes also be admitted. It is obvious the Senator never adverted to the eventuality that his "perpetual" grant should be withdrawn from the public and given over to his heirs. Indeed, it is doubtful whether any right of reversion was meant to be attached to his gift to the municipality.

The fact of the matter is that the decision to prefer closure to non-discrimination is not attributable to Senator Bacon, but to the State of Georgia, acting through its courts, at the prompting of the administrators of the park (who may, in that capacity, be deemed public officers, since they are administering a public facility). The reversion of the Baconsfield property to private hands did not occur automatically, by operation of law: the active participation of an agency of the State necessarily intervened before that result could be accomplished. Nor was the decree a mere formality, inexorably predetermined by events. There were many alternatives, one of which had to be se-

lected. Our submission is that Georgia contravened the Fourteenth Amendment by making a discriminatory choice.

2. What were the options? In the first place, the restrictive provision might have been treated as not written, because contrary to overriding public policy embodied in the supreme law of the land. Cf. *Hurd* v. *Hodge,* 334 U.S. 24, 34–36. In the absence of any indication that a comparable facility was then available to the Negro residents of Macon, it is doubtful that Senator Bacon's attempt to exclude them totally from a public park satisfied even the "separate but equal" doctrine of *Plessy* v. *Ferguson,* 163 U.S. 537, prevailing in 1911 when the will was written. And it is at least arguable that the intervening decision in *Buchanan* v. *Warley,* 245 U.S. 60, outlawed racial restrictions of this kind before the bequest of the park property to the public was executed in 1920. But even if it was only later that it became constitutionally unenforceable, the Georgia courts might have struck the clause prospectively, thus avoiding giving any effect to an offensive stipulation. Cf. *Barrows* v. *Jackson,* 346 U.S. 249, 254.

Another alternative was to decline reversion on the ground that the park had been irrevocably dedicated to the public. As we have noted, Senator Bacon's will did not provide for contingent reversion to his heirs: on the contrary, the instrument required that "all right, title and interest" in the property, expressly including "all remainders and reversions," be vested in the municipality, for the "perpetual and unending"

benefit of the public, and, specifically, to be "forever used and enjoyed as a park and pleasure ground," "under no circumstances" to be "sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use" (A. 19; see also, the last sentence of Item 3rd of the Codicil, at A. 30). Both the deed from the executors to the City executed upon delivery of the property in 1920 (A. 353; see also A. 405–409) and later representations made to the United States (A. 440–441, 448, 451) indicate an indefeasible title in the municipality. So, also, the actual use of the park by the public for half a century argued against implying a requirement of reversion. See Ga. Code § 85–410.

Of course, if the municipality had been found to hold an irrevocable title to the property, the decree below could not have been entered. The suit of the heirs, lacking any legal interest, would have been dismissed. The City itself presumably could not close the park merely to avoid desegregation. Cf. *Griffin* v. *School Board,* 377 U.S. 218. And, at all events, the city was not praying for such a result; indeed, the State Attorney General, representing the public beneficiaries, was, at least formally, urging continuance of the park (see A. 502, 509, 512, 515).

Finally, the most obvious solution was to apply the *cy pres* principle to continue Baconsfield as a public park, albeit desegregated, on the ground that this would be carrying out the dominant purpose of the charitable trust. See Ga. Code § 108–202. Surely, it would have been natural to view the establishment of a public recreational facility as the main object of

the trust and to find that the constitutionality required admission of Negroes—which did not oust the original class of beneficiaries—would not defeat that goal. A charitable court might indulge the supposition that Senator Bacon himself would amend his grant to remove the exclusionary clause if he were alive in the changed circumstances of today. But, however that may be, it was certainly within the normal boundaries of the *cy pres* doctrine to treat as incidental, and not of the essence, the racial stipulation attached to the trust. Indeed, it is difficult to understand how the courts below could find that exclusion of Negroes, rather than continuation of the park as a public facility, was the fundamental purpose of the grant.

In our view, the availability of the several less drastic options, each apparently consistent with local law, invalidates the choice made. That is true, we believe, even if each of the alternatives was equally permissible as a matter of State law. Whatever the proper limits of the principle that the Constitution is not violated by neutral State action unavoidably supporting a private discriminatory decision, but see *Shelley* v. *Kraemer,* 334 U.S. 1, the claim of neutrality will not avail when, in light of other possible solutions, the means selected *needlessly* aids discrimination. Cf. *Reitman* v. *Mulkey,* 387 U.S. 369. As a matter of fact, however, it seems plain that the courts below were not confronted with an evenly balanced series of options; everything favored a resolution that would permit continuation of the park. In the circumstances, we are inevitably led to the conclusion that in preferring the last resort of reversion the

Georgia courts were applying a special rule which accords critical weight to racial restrictions. It is of course immaterial whether the rule was independently fashioned by the courts or merely reflects the public policy of the State. In either case, impermissible governmental action is present: the attempt to escape official responsibility by invoking Senator Bacon's supposed preference cannot succeed. Cf. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 725.

3. It only remains to respond briefly to the suggestion that the decree below cannot offend the Constitution because the petitioners and the class they represent have no "federal right" to enjoy Baconsfield Park and thus have not been legally injured by the action which closes it. There are several answers.

To be sure, the Fourteenth Amendment does not grant petitioners a right, *simpliciter,* to enjoy the Baconsfield property. But it does assure that they shall not be excluded from the benefits of a public facility on the ground of race. And that is precisely what is threatened here: the method is a total closure of the park, but the purpose is racial, and the effect, so far as Negroes are concerned, is the same as if whites remained free to enjoy the park. It does not alleviate the practical injury to the class that others also are adversely affected by the discriminatorily motivated action. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer, supra,* 334 U.S. at 22. It is, moreover, plain that the disadvantaged Negro community of Macon will suffer unequally by the

withdrawal of Baconsfield to private lands. Cf. *Griffin* v. *School Board, supra.*

There is another aspect to the decision below. The fact is that Negroes are to be deprived of the park solely because they insist on exercising their declared right to share it so long as it remains open to the public. That is more than imposing an impermissible penalty on the assertion of a constitutional right, cf. *Shapiro* v. *Thompson,* 394 U.S. 618, 631; the consequence is so drastic as wholly to discourage the bootless effort in future. Cf. *Barrows* v. *Jackson, supra.* And there is of course a corresponding encouragement to resist voluntary acquiescence in nondiscrimination. That, too, is an involvement forbidden to State officers by the Fourteenth Amendment. Cf. *Reitman* v. *Mulkey, supra; Anderson* v. *Martin,* 375 U.S. 399; *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 463.

Finally, and perhaps most important, the decision below injures the Negro citizens of Macon in the same fundamental sense as all officially supported racial discrimination. Here, as in *Strauder* v. *West Virginia,* 100 U.S. 303, 308, the published official action directed at Negroes as a race "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." This alone condemns the action of the State courts, regardless of whether petitioners can show any more tangible loss. Cf. *Brown* v. *Board of Education,* 347 U.S. 483, 493–495. As we view it, the decision strains to reach the extreme result of reversion and thereby announces an official view that the

Negro's presence in the park would be so obnoxious that it is preferable to close the facility altogether. That, we submit, is a plain denial of that "equal protection of the laws" which the Fourteenth Amendment was framed to assure.

CONCLUSION

For the reasons stated, the judgment below should be reversed.

Respectfully submitted.

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